Grove Roofing, Inc., and DiPietro Construction, Inc. *and* George Mahon. Case 4–CA–18929

March 23, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On June 18, 1991, Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed cross-exceptions and a supporting brief. The General Counsel also filed a brief in response to the Respondent's exceptions and the Respondent filed a brief in response to the General Counsel's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified.

1. The judge found that the Respondent violated Section 8(a)(1) of the Act by unlawfully promising improved benefits to its employees in return for voting against the Union, and the Respondent has excepted to that finding. We disagree with the judge.

The Respondent's president, Bradney, having summoned employees to a meeting to introduce a new pension and medical benefits package, was chagrined to find that the insurance company representatives presenting the plan were unprepared and that they were unable to answer the employees' questions. Taking the meeting over from the representatives, Bradney expressed his disappointment with the presentation, and asked his employees to give him a chance to make a better presentation to them. The dissatisfied employees, however, contacted a union and arranged for a meeting to be held about a week later. Bradney, upon learning of the meeting, immediately contacted his lawyer for advice, and on the morning of the union meeting, disseminated a letter to the employees expressing his opposition to unionization and urging them inter alia to ''think carefully'' before signing anything.[2] As Bradney distributed the letters to a group of employees at one jobsite, he reiterated that he was dissatisfied with the December 27 benefits presentation and asked them to give him a chance to put a good package together for them.

The judge, while noting the principle that an employer has a legal duty to proceed as it would have had there been no union activity,[3] nevertheless concluded that the Respondent violated Section 8(a)(1) by unlawfully promising its employees improved benefits in return for voting against the Union. He reasoned that Bradney was not merely proceeding the way he would have had there been no union in the picture, as evidenced by his haste in contacting his attorneys when faced with the possibility of unionization and in disseminating a letter expressing his opposition to unionization. He further found:

> Absent a showing that similar letters or meetings would have been held solely for the purpose of addressing employee dissatisfaction with the proposed benefit plan, I conclude, as Bradney states, that the letter and the meeting at issue were designed as responses to employee union activity. In that context, Bradney's admitted request that the employees, ''[G]ive me a chance and I will put a good package together for us,'' reasonably conveyed the message that if the employees held off on their quest for union representation, Bradney would deliver a benefit package they would accept.

We disagree with the judge's conclusion that the Respondent made an unlawful promise of benefit to its employees in return for voting against union representation. There is nothing unlawful in an employer's contacting counsel for advice in response to its employees' union activities, whether or not done in haste. The letter Bradney disseminated was not alleged to violate Section 8(a)(1), so we are left with Bradney's statement to the employees at the jobsite, ''give me a chance and I will put a good package together for us.'' We find that this statement is nothing more than a reiteration of the message he gave them at the close of the benefits meeting, when it appeared to everyone involved that the presentation of the package was wholly unsatisfactory. Bradney's statement to his employees at that meeting—that he would be back to give them a better presentation—was not unlawful. His statement to the employees a week later, after the Union entered the picture, was simply a restatement of the same idea. We cannot conclude that the additional factor of the Union somehow made Bradney's statement unlawful, when it appears that he was simply reminding the employees of a course of action that the Respondent had decided

[1] The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We grant the exception of the General Counsel requesting that the judge's reference to an ''unproved'' pension and medical plan be corrected to read ''improved.''

[2] This letter is not alleged to be a violation of the Act.

[3] Citing *Gates Rubber Co.*, 182 NLRB 95 (1970).

to take and had set in motion before the advent of the Union.[4]

Even if Bradney's letter and meeting with employees at the jobsite were ''designed as responses to employee union activity,'' as found by the judge, they are within what the law permits and, as such, they cannot be allowed to bootstrap into an 8(a)(1) violation a statement that merely reflects a continuation of a course of action that predated the employees' effort to secure union representation. Nothing in Bradney's statement can be construed as conditioning his continued effort to develop a pension and health care package on the employees' abandonment of their support for the Union. Accordingly, we reverse the judge's finding of an 8(a)(1) violation.

2. We agree with the judge that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate or offer to reinstate Marc Stasen, Michael E. Mahon, Thomas McKeown, and William D. Ballentine prior to August 1990, but we do not agree that backpay should run from the date of the layoff because there was no finding of an unlawful layoff. Accordingly, we shall modify the remedy and Order to reflect that backpay shall commence at the point a successor crew took over the project following the winter weather hiatus.

AMENDED CONCLUSIONS OF LAW

Delete Conclusion of Law 3 and renumber the remaining paragraphs.

AMENDED REMEDY

The Respondent shall make whole Marc Stasen, Michael E. Mahon, Thomas McKeown, and William D. Ballantine for any loss of earnings suffered during the period beginning in March 1990, when the crew headed by Jimmy Kalinoski arrived at the Chichester Junior High School jobsite to complete the roofing work there, and ending on August 13, 1990. Backpay shall be computed in the manner prescribed by the judge in the remedy section of his decision.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Grove Roofing, Inc., and DiPietro Construction, Inc., Ivyland, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(a) and reletter the remaining paragraphs.

2. Substitute the following for paragraph 2(a).

''(a) Make Marc Stasen, Michael Mahon, Thomas McKeown, and William D. Ballantine whole for any loss of earnings and other benefits between the date in March 1990, when the crew headed by Jimmy Kalinoski arrived at the Chichester Junior High School jobsite to complete the roofing work there, and August 13, 1990, as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision, as amended.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to reinstate employees because they join unions or otherwise engage in union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Marc Stasen, Michael Mahon, Thomas McKeown, and William Ballantine whole for any loss of earnings or other benefits resulting from our failure and refusal to reinstate them, plus interest, and WE WILL remove from our files any reference to our failure and refusal to reinstate these employees, and notify them in writing that this has been done and that this failure to reinstate will not be used against them in any way.

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[4] See *Kenrich Petrochemicals*, 294 NLRB 519, 523 (1989) (having formulated and announced a plan prior to the advent of the union, to grant a 7-percent wage increase when sales reached $1.2 million per month, the respondent did not make an unlawful promise of benefit in violation of Sec. 8(a)(1) when it referred to this plan during the union organizing period; it was simply reaffirming and reminding its employees of its previously announced plans). See also *Cartridge Actuated Devices*, 282 NLRB 426, 427–428 (1986). Cf. *Maremont Corp.*, 294 NLRB 11, 38 (1989).

Bruce G. Conley, Esq., for the General Counsel.
Douglas R. Sullenberqer, Esq. and *Andrea L. Ryan, Esq*., for the Respondent.

DECISION

CLAUDE R. WOLFE, Administrative Law Judge. This proceeding was litigated before me at Philadelphia, Pennsylvania, on February 13 and 14, 1991, pursuant to charges filed by George Mahon on May 21, 1990, and complaint issued on July 31, 1990, alleging Grove Roofing, Inc. and DiPietro Construction, Inc. (Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discharging Marc Stasen, Michael E. Mahon, Thomas McKeown, and William D. Ballantine, and making unlawful threats and promises to its employees designed to dissuade them from selecting United Union of Roofers, Waterproofers, and Allied Workers Local 30, AFL–CIO (the Union) as their collective-bargaining representative. Respondent denies the commission of unfair labor practices.

On the entire record,[1] and after considering the posttrial briefs filed by the parties and the testimonial demeanor of the witnesses appearing before me, I make the following

FINDINGS OF FACT

I. BUSINESS OF THE RESPONDENT

The parties stipulated that Grove Roofing and DiPietro Construction (Respondent) are Pennsylvania corporations engaged in the roofing business, are a single employer within the meaning of the Act, and during the year preceding the issuance of the complaint, in the course and conduct of Respondent's business operations, performed services valued in excess of $50,000 directly for customers located outside the Commonwealth of Pennsylvania. Respondent admits, and I find, it is and has been at all times material to this proceeding an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the parties stipulated, and I find the Union is and has been at all times material to this proceeding a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

On December 22, 1989, William Bradney, the president and owner of Grove Roofing, directed a memo to all employees requiring them to attend a December 27, 1989 meeting at a restaurant. The purpose of the meeting was the presentation of a proposed pension and medical benefits plan. The presentation was conducted by two gentleman representing an insurance company. Dissatisfied, as were other employees, with the proposed plan and the explanation of it given at the meeting, George Mahon called the offices of the Union and arranged a meeting with Daniel Conway, a union business agent. The parties agree and I find that George Mahon was a roofing foreman and a statutory supervisor within the meaning of the Act at all times material to this case. Within a day or two thereafter, Conway met with Mahon who told him there were several employees interested in joining the Union. Conway then set up a meeting at the union hall for the night of January 4, 1990, advised of this scheduled meeting by his son who had been told of it by George Mahon, William Bradney contacted labor counsel who drafted a letter for Bradney to distribute to employees, and advised him not to belittle the Union and not to threaten employees or make them any promises.

On January 4, at about 6 a.m., William Bradney conducted a meeting with supervisors, including George Mahon. Bradney presented them with the following letter drafted by Respondent's attorneys:[2]

> TO: All Employees
>
> FROM: Bill Bradney
>
> Some of you have told us that Roofers Local 30 is interested in having our employees join their union. The union may be asking you to sign union ''authorization cards,'' stating that you want Local 30 as your bargaining agent. I strongly urge you not to sign the cards, since I think that, after you learn the facts, you will agree that you do not need or want Local 30 to represent you.
>
> You do *not* have to sign a card. Please read and think carefully about what you are signing before you sign anything.
>
> Local 30 probably will tell you that the purpose of the card is only to obtain an election before the NationaL Labor Relations Board. Please read the fine print on the card. Typically, such cards directly authorize the union to represent you for purposes of collective bargaining. Are you ready to have this union represent you?
>
> The card could also be an application for union membership. In that case, you could commit yourself to pay union dues beginning on the date you sign the card. Signing the card could be like signing a blank check. By signing a card, you may be committing yourself to union representation. THINK CAREFULLY BEFORE YOU DO THAT. Is that what you really want?
>
> I know some of you are upset about the benefits meeting we had the other day. I was upset too. I don't think the presentation was clear. I do think that the program, once the bugs are cleared up, will be a good one for each of you and the Company. We'll be talking to you more about it. In the meantime, do not make any hasty decisions.
>
> Unions may promise the moon and the stars, but cannot deliver. A union cannot force a Company to agree to any contract provision or wages or benefits that the Company is not willing to agree to or is unable to meet. The Union cannot increase wages or benefits unless the Company feels it is in its best interest to do this. A Company has no legal obligation to agree to any Union demand. Everything employees get would have to be negotiated. The Company would not agree to anything that is not in its best interest.
>
> I do not think a union is right for our employees or our Company. I have provided good, steady employ-

[1] Certain errors in the transcript are noted and corrected.

[2] Respondent was represented by a different law firm at trial before me.

ment. The future looks good. I want to work with you to continue to build toward our bright future.

If you have any questions about the cards or anything else, ask me. If I do not know the answers, I will get them.

After talking to the supervisors, William Bradney visited three jobsites that morning and distributed copies of the above letter to employees.[3] One of the three was the Chichester Junior High School job where George Mahon's crew was working. There Bradley distributed the letter to the employees assembled, and met with them for a half an hour or so. There is general agreement among the witnesses to this meeting, and I conclude, that Bradney told the employees that he was not satisfied with the December 27 presentation, and was trying to assemble a pension and medical plan satisfactory to the employees. That unanimity does not exist with respect to what Bradney may have said concerning the union. The complaint alleges that he threatened to close the business and threatened a loss of benefits if the employees selected the Union to represent them. The testimony proffered in support of these threat allegations is given by employees Marc Stasen, Michael Mahon, William Ballantine, and Thomas McKeown, the subjects of the unlawful discharge allegations in the complaint.

Stasen testified on direct examination that Bradney said he had heard of the upcoming union meeting, could not compete if he had to go union, and would not allow the employees to go union. On cross-examination, he testified as follows:

Q. Okay. You said that during this conversation, he told you that he wouldn't allow you—or allow the union in; is that correct?

A.That's the way I took—it, yes.

Q. The way you took it; is that what he said?

A. I can't say word for word, but it was—he could not compete. It was that the company would not be able to compete.

In a sworn statement given to a Board agent in June 1990, Stasen said no one from the Bradney family other than William Bradney's son ever said anything to him about the Union. Stasen then explained that when he gave the affidavit there was no discussion of anything other than telephone conversations he had with Bradney Jr.

Michael Mahon first gave confused testimony that Bradney said he was not going union no matter what and if employees did not go with the Union they would not be employed there. He then amended this testimony to reflect that Bradney said if the employees did not accept the new package they would no longer be employed. His pretrial affidavit asserts that Bradney said anybody who did not go with his insurance plan could not work. I am persuaded Michael Mahon's testimony lends little support to the allegations of the complaint that Bradney made threats of closure and/or loss of benefits if employees selected the Union. Moreover, all of Michael Mahon's testimony concerning the events of January 4, 1990, is questionable because the Company's records reflect no wages for him during that week, and his conjecture that he might have been paid with cash under the table that week so he could collect unemployment benefits, but he doesn't quite remember that such a transaction took place, simply is not believable.

William Ballantine testified that Bradney said he did not want the Union in his company, and would not be able to function if the Union was in. Ballantine's affidavit of June 11, 1990, relates that Bradney said he did not want the Union, and the employees would be better off without it.

Thomas McKeown, who concedes he was not paying much attention and was not listening all the time, testified, both on direct and cross-examination, that Bradney advised he was not going union and would have to close the Company in the event employees selected the Union. On cross-examination, McKeown reports that Bradney said ''The union would take all our benefits.'' The General Counsel contends this was a threat of loss of benefits violative of the Act. I disagree. Assuming McKeown, not a particularly impressive witness, is correct, Bradney's statement was a prediction, perhaps a misrepresentation, not within Respondent's power to carry out, and not a violation of the Act. *Tappan Co*., 228 NLRB 1389, 1390 (1977), on which the General Counsel relies as support for his contention the statement reported by McKeown was a threat of loss of benefits, held it was a violation of Section 8(a)(1) to give employees the coercive and threatening impression they would automatically lose coverage of the existing retirement savings plan. No such impression is conveyed by Bradney's statement of opinion nor can it be construed as a threat the Employer would do anything to adversely affect existing benefits.

George Mahon, the Charging Party, only heard Bradney voice his displeasure with the December 27 meeting and state he was trying to work something out with respect to the medical and pension plans. George Mahon then left the scene to attend lo other duties.

John Modres just has a general recollection of what Bradney said, does not recall any statements concerning the Union, and does not think Bradney said anything like he would shut down if the Union got in.

Theodore Kalinoski recalls Bradney saying he would not be able to compete if he had a union shop. Kalinoski further recalls employee Dave Suda saying the Union was no good for the employees, and Bradney then saying, ''Listen to Dave, he will tell you.'' At this point, says Kalinoski, he left to attend to other duties.

According to William Bradney, he called the employees together, passed out the letter, told them to read it, and go to the union meeting to see what was going to happen. He relates that he then told the employees he knew the December 27 presentation was not good, and asked them to give him a chance to put a good package together. There were many questions from employees concerning the proposed content of the package, and Bradney recalls saying he had to have the package put together so he could stay in a competitive bid market. He recalls no questions concerning the Union, and says he did not tell employees he would shut the Company down if the Union got in.

Keeping in mind the fact that George Mahon, William Bradney, and the four alleged discriminatees are patently not disinterested witnesses, and the consideration that (1) the employees assembled had just read or were reading the letter distributed to them when Bradney entertained their questions; (2) the Letter was prepared and the meetings held in reaction to the information received by Respondent that there was

[3] Bradney's brother took the letter to other jobsites.

about to be a union meeting; (3) the obvious possibility employees confused what they read with what Bradney said; (4) the not uncommon case that people will testify to what they believe to be the meaning of written or spoken words rather than the exact wording of the communication; and (5) the passage of more than a year between the events complained of and the hearing before me, I have arrived at the following conclusions concerning the content of the January 4 meeting. As previously noted, I find that William Bradney did tell the employees, consistent with his letter, that inasmuch as he and they were not satisfied with the December 27 presentation he was trying to assemble a more acceptable benefits plan. It has long been settled that an employer has a legal duty to proceed as he would have done had there been no union activity.[4] If, therefore, Respondent was merely proceeding as it would have in the absence of a union, Bradney's statement did not violate the Act, and had Respondent adopted the program so poorly explained it would have been lawful as a continuation of a course of conduct decided upon and commenced prior to the appearance of the Union on the scene. Moreover, if Bradney had merely advised employees that program would be adopted his conduct would have been lawful, but the circumstances present require a closer examination of that which might on its face appear permissible under the Act. There is no evidence the letter or the meetings would have existed had Respondent not been told of the union meeting. William Bradney's testimony establishes he ''immediately'' consulted labor lawyers because he had been told on January 3 of the union meeting, and the letter and the January 4 meetings were designed as responses to union activity. The General Counsel does not allege in the complaint, and specifically disavowed at trial, that the letter itself violated the Act. I therefore make no finding that it does, but the reasons for the letter and the meetings, as well as the content of the letter, are circumstances which must be considered in determining the lawfulness of Bradney's statements on January 4. Absent a showing similar letters or meetings would have been held solely for the purpose of addressing employee dissatisfaction with the proposed benefit plan, I conclude, as Bradney states, the letter and the meeting at issue were designed as responses to employee union activity. In that context, Bradney's admitted request that the employees, ''[Give me a chance and I will put a good package together for us,'' reasonably conveyed the message that if the employees held off on their quest for union representation Bradney would deliver a benefit package they would accept. It is a close question, but I find this amounts to a promise of benefit if employees ceased or delayed their union activity, and therefore reasonably tended to interfere with employees in the exercise of the rights guaranteed them in Section 7 of the Act and therefore violated Section 8(a)(1) of the Act.

Given Bradney's admitted opposition to the Union, as well as the January 4 letter expressing that opposition, I am persuaded William Ballantine's assertion that Bradney said he did not want the Union in should be credited, noting also this testimony is consistent with Ballantine's June 11, 1990 affidavit and therefore not of recent invention. It is difficult however to square Ballantine's trial testimony that Bradney said the Company would not be able to function if the Union was in with his sworn affidavit statement, made within 5 months of the event rather than 13 months as is the case of his trial testimony, that Bradney said the employees would be better off without the Union, but the two statements are not mutually exclusive. Noting that Bradney says he told the employees on January 4 that he had to have the health and pension package to stay competitive, Bradney's testimony that the presence of a union would make it more difficult for him to compete, and Kalinoski's recollection, which I credit, that Bradney said he would not be able to compete if he had a union shop, I conclude that Ballantine was reciting before me his interpretation of what Bradney said concerning the effect of a union on competitiveness, but that Kalinoski's version, which draws some support from Stasen's rather reluctant recollection that Bradney said the Company would not be able to compete, is the more accurate. The Supreme Court pointed out in *Gissel*[5] that when an employer makes a prediction concerning the adverse impact on its business by unionization that prediction ''must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control,'' and conveyance of this belief, even if it be sincere, is not a statement of fact unless those consequences are capable of proof. Here, there is no evidence proffered, other than Bradney's ipse dixit, that unionization would destroy or even impair Respondent's competitiveness. The Board has found that a prediction that unionization could cause lack of competitiveness leading to a loss of business and jobs, viewed against a background of extensive unfair labor practices including threats and discrimination against union supporters, violates the Act.[6] In this case, Bradney did not go beyond predicting a lack of competitiveness to add a prediction of loss of business or jobs, and I do not believe the simultaneous promise which I have found violative of the Act created a sufficient environment of antiunion hostility to warrant finding Bradney's prediction of on-competitiveness to be unlawful. I am persuaded the issue before me is answered by *Tri-Cast*, 274 NLRB 377 (1985), which in the Board held that an employer's statements it could not remain healthy with union restrictions because they would decrease its flexibility and competitiveness were moderate comments on possible consequences of unionization and campaign comments containing no unlawful threats. I conclude Bradney's remarks concerning competitiveness did not exceed those found lawful in *Tri-Cast*, and therefore did not violate the Act.

Some 46 employees attended the January 4 union meeting at 6:30 p.m. Of these, 29 signed union authorization cards. Ten of the twenty-nine signers were members of George Mahon's crew. George Mahon also signed. Premeeting contacts with employees soliciting them to attend were conducted by George Mahon and Marc Stasen who divided Respondent's employee list for this purpose. During the course of these contacts George Mahon advised General Foreman Robert Bradney of what was going on, and Stasen invited William Bradney Jr., the son of William Bradney, Respondent's president, to the meeting.

The roofing work at the Chichester Junior High School commenced in May 20, 1989, with a projected completion date of December 1989. George Mahon's crew was assigned

[4] See, e.g., *Gates Rubber Co.*, 182 NLRB 95 (1970).

[5] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618–619 (1969).

[6] *Harrison Steel Castings Co.*, 293 NLRB 1158 (1989).

to do the work. The owner of the premises is the Chichester Board of Education. The project manager was Robert Zmijewski, director of operations for ARMM Designs, Incorporated, who contracted the roofing work to Respondent. Zmijewski has no apparent interest in the outcome of this proceeding, was a confident and believable witness, and is credited. Zmijewski testified he visited the jobsite 12 or 15 times in 1989 because he had received complaints from the board of education concerning delays in the work, foul language on the job, debris at the site, and other matters. He also spoke on several occasions concerning roof leaks and delay in completion of the contract. The leaks caused considerable damage to the school interior and furnishings. Zmijewski said the leaks were the result of failure to properly complete detail work, i.e., metal flashings which are an integral part of roofing work.

On January 8, William Bradney went to the Chichester jobsite. It was an overcast day with, according to climatological data published by the National Climatic Data Center, Department of Commerce, temperatures ranging from 28 degrees Fahrenheit to 38 degrees, averaging 33 degrees, and fog, smoke or haze, and ice pellets. William Ballantine confirms there were light snow flurries, and Theodore Kalinoski recalls it was drizzling. The witnesses generally agree it was not good weather for roofing. George Mahon's crew was loading materials on the roof by hand preparatory to the next day's work when William Bradney arrived. According to Bradney it was overcast with intermittent showers, altogether a very bad day for roofing, and he went to the Chichester job to see why there was work in progress at that location. I conclude, from his testimony that he went to the job as soon as he found there was work in progress there, that the testimony of George Mahon, Thomas McKeown, and Michael Mahon to the effect he came in the morning is correct and there is no reason to seriously question George Mahon's estimate of 8:30 a.m.

Bradney testified that he became angry when he found men taking material from the ground to the roof by hand rather than getting the company crane to do the job, and he then called George Mahon aside and told him he had no business working there that day, was only trying to drag the job out, and was hurting the Company working on days like that, and Bradney was shutting the job down. Bradney denies making any mention of the Union. George Mahon recalls Bradney asking him what he was doing on the job, and saying the crew should not be out there on a bad day. Mahon says he responded that they were loading material for the next day, to which Bradney replied by taking him aside and stating Mahon was calling the Union and was personally trying to ruin the Company and bring it to its knees. According to Mahon, he denied this was true, and said he was only interested in his welfare and that of his men, to which Bradney repeated he only saw Mahon was trying to ruin the Company. Shortly thereafter, Bradney announced he was shutting the job down, and would call the employees back to work as needed.[7] No employees other than George Mahon testify to the statements concerning the Union attributed to Bradney by Mahon. This is not a determining factor because Bradney took Mahon aside and talked to him privately. Mahon's pretrial affidavit given to a Board agent on June 11, 1990, says that Bradney took him aside and said Mahon was personally trying to bring the Company to its knees and was trying to destroy the Company, but said nothing else. According to Mahon, he did not include Bradney's comments about the Union in his affidavit because he ''just didn't think of it at the time.'' Mahon filed the charge in this case on May 21, 1990, alleging he and the four alleged discriminatees were laid off and refused recall in order to discourage union membership. It is difficult to believe that in the course of giving a sworn statement in support of that charge that he ''just didn't think of'' Bradney's statements concerning the Union on January 8, but now vividly recalls them. Although Bradney and George Mahon were in a one-on-one discussion, part of that discussion was overheard by Theodore Kalinoski and William Ballantine. Kalinoski states he heard Bradney tell George Mahon that Mahon was bringing the Company to its knees. Ballantine recollects hearing Bradney referred to the men's presence on the job as a waste of his time and money. I do not credit George Mahon, who was not always a particularly convincing witness,[8] that Bradney stated Mahon was calling the Union. Ballantine's recollection that Bradney referred to a waste of his time and money tends to support Bradney's claim he was angered that the men were working in inclement weather. I conclude that Bradney did say the things to which he testified, but I further conclude on consideration of the testimony of Kalinoski and Mahon, and the pretrial affidavit of Mahon to the same effect which shows this testimony of Mahon is not of recent invention, that Bradney also accused Mahon of trying to bring the Company to its knees. There is nothing in the record other than Mahon's union activity which might have provoked Bradney to believe Mahon had embarked on a campaign to bring financial disaster to Respondent. It is true that, as more fully described later in this decision, the performance of Mahon and his crew on the Chichester Junior High School job had been the subject of complaints and had contributed to a failure to timely complete the project, but there is no persuasive evidence this performance which Respondent considered to be considerably less than satisfactory work performance was the result of a deliberate scheme engineered and orchestrated by George Mahon. In the absence of any convincing reason shown for Bradney's accusation to Mahon that he was trying to bring the Company to its knees, I conclude Bradney was referring to Mahon's leadership in the union effort.

Marc Stasen, George and Michael Mahon, Stephen Fetscher, Theodore Kalinoski, William Ballantine, Thomas McKeown, John Modres, and David Suda were on the Chichester job during the week ending January 14, 1990. All but Suda were laid off on January 9. Suda continued to work at that jobsite continuously through June 1990 at the earliest. During the week ending January 21, Suda worked alone on

[7] Respondent's brief concedes Bradney indicated to Mahon's crew they would be called back in the spring.

[8] As an example of the sometimes unreliable character of his testimony, George Mahon's testimony that he did not know whether he had talked to Russell Egger, Respondent's project manager, about the witnesses who would be appearing for the Company at the hearing is simply not believable. There is no evidence Mahon did in fact have such a conversation, but that he would not know whether he had indicates that he has an extremely poor memory or he was not entirely candid as a witness. Either alternative reflects on his credibility.

that job for 5-1/2 hours. He was joined by Van Dusen during the weeks ending January 28 and February 4. They in turn were joined by Donald Miller the week ending February 11. The work force on the Chichester jobsite then swelled to six the weeks ending February 18 and 25, and March 4 and 11, dropped to five the week ending March 18, and raised to seven the week ending March 25. During these periods the total hours worked by all employees on the job were, in consecutive order: 21.50, 65.5, 80.5, 105, 78, 153, 77.5, and 97.5. Thereafter, commencing the week ending April 1 when 15 employees worked a total of 464.5 hours on the Chichester job, it appears Respondent resumed full-time work on the Chichester Junior High School job, as the weather or other circumstances permitted, until the job's completion.

That Suda, who openly opposed the Union and who apparently did not attend the union meeting or sign an authorization card, lost little if any work, and the further circumstance that Van Dusen, the next employed on the Chichester job, apparently neither attended the union meeting or signed a card is worth noting, but is somewhat diminished in probative value by the subsequent employment of Miller, Modres, and Fetscher, all of whom attended and signed cards.

John Modres and Stephen Fetscher were employed during the payroll period January 24 and at various times thereafter. Theodore Kalinoski was recalled to work during the payroll period ending January 31, a couple of days after he told Marie Bradney to tell William Bradney that Kalinoski ''would like to stay with Bill.'' Stasen, Michael Mahon, McKeown, and Ballantine were not recalled until Respondent issued a letter to each of them on August 3, 3 days after the complaint issued in the instant case, offering them recall to their former position effective August 13, 1990. The parties agree that this offer tolls any backpay liability. None of the four accepted recall.

George Mahon called Project Manager Russell Egger in mid- or late January 1990, and asked if William Bradney would bring him back in the spring. Egger asked Mahon to meet with him and Robert and William Bradney the following morning to air all their problems and bring the whole thing to a head. Mahon said he wouLd come in, but did not do so.[9]

George Mahon and Marc Stasen were active and open solicitors of both employees and supervisors to attend the union meeting, and this was known by Respondent. It is not clear that Respondent was also aware of the degree of union activity and support of McKeown, Michael Mahon, and Ballantine. The Respondent did, however, have ample reason to suspect these three were of like mind with Stasen and George Mahon concerning the Union by virtue of their close and publicly demonstrated relationship with George Mahon. In the case of Michael Mahon, George's brother, the relationship was obvious. Add to this that Ballantine lived in George Mahon's home for 8 or 9 months, McKeown is George Mahon's best friend whom he has known for more than a decade, and the further fact that George Mahon selected these men for his crew and normally took his brother, McKeown, Stasen, Ballantine, and Theodore Kalinoski to work in George Mahon's company provided vehicle, and it is fair to conclude Respondent believed they were a closely knit group.[10] In the circumstances, I conclude Respondent most likely believed these associates of George Mahon were, like him, involved in the union activity in progress at the time of the layoff or, at the least, shared his attitude which then appeared to be prounion.[11] Respondent denies any knowledge of the union activities of the alleged discriminatees, and asserts that William Bradney only had general knowledge of employee union activity and had been told by a few foremen of their attendance at the union meeting. These unidentified foremen clearly knew who was present at the meeting and what they did there. Respondent, citing sections of the official record, relates in its posttrial brief that ''The foreman chooses a crew of approximately ten to fifteen men and assumes responsibility for completion of the job. With few exceptions, the foreman has complete control over the men who are assigned to work on his crew.'' By so doing, Respondent concedes, consistent with its position concerning the status of George Mahon, that all job foremen possess sufficient independent authority over employees to establish they are supervisors within the meaning of Section 2(11) of the Act. Knowledge of a supervisor is properly attributable to his or her employer.[12] This presumption has not been rebutted by appropriate credible supervisory testimony. For the foregoing reasons I conclude Respondent knew who attended the union meeting and signed union cards and had ample reason to believe Stasen, Ballantine, Michael Mahon, and McKeown shared George Mahon's openly demonstrated interest in union representation.

With respect to antiunion feelings which Respondent denies were a motivating factor in the layoff and failure to recall at issue, the haste with which Respondent moved to meet with employees, present them letters conveying the message that Respondent was opposed to unionization, and offer to present an unproved pension and medical plan is enough to show Respondent did not favor union activity by its employees, and his statement to George Mahon that Mahon was attempting to bring Respondent to its knees, which I find was a reference to Mahon's union activities, betrays the depth of Respondent's antagonism toward union representation. Put these factors together with the retention of Suda who was openly antiunion, the recall of Fetscher and Modres who do not appear to have been close associates of George Mahon, the rapid recall of Theodore Kalinoski within a couple of days of his message to Respondent that he ''would like to stay with Bill,'' thereby not too subtly conveying a willingness to support company positions, and the failure to recall the alleged discriminatees, as promised on January 8 until August 1990 after the complaint in this case issued, and this evidence and the evidence of knowledge is enough to infer the employees' protected union activity was a motivating factor in Respondent's decision to lay off and

[9] I have credited Egger's account which is corroborated by Mahon in most particulars. Where they differ, Egger is credited.

[10] With respect to Kalinoski, it must be kept in mind that he was recalled to work after he made a statement implying he would adhere to William Bradney's views.

[11] The fact that George Mahon now downplays the degree of his enthusiasm for union representation does not obscure the simple fact he publicly appeared to be an ardent unionist at the time of the alleged unfair labor practices.

[12] *Pinkerton's Inc.*, 295 NLRB 538 (1989).

refuse to recall these employees.[13] Respondent, in order to prevail, is therefore required to come forward with proof the layoff and failure to recall would have taken place had there been no union activity.[14]

Although employee union activity was a motivating factor for the January 8 shutdown, it was not the only factor. William Bradney, irritated at the presence of the union effort and blaming it on George Mahon who started it, was also upset with the problems of delay and work performance on the Chichester job. When he discovered the men working in weather unsuitable for roofing and manually carrying materials to the roof when they might have secured a company crane to do the job easier and quicker, and then discovered some flashing which he had previously directed be sealed was not done, these discoveries and his existing dissatisfactions with the work performance, suddenly came together and caused him to shut the job down. A full crew was not again used there until about April. This factor, no full crew on the job until April 1 or thereabouts, combined with the clearly intemperate weather on January 8 and the credible evidence that the job shut down was a spur of the moment decision immediately precipitated by the bad weather and the performance of unproductive work on January 8 convinces me Bradney would have shut the job down on January 8 even if he had not been disgruntled by Mahon's union activity. Accordingly, I conclude and find the shutdown and resulting layoff did not violate Section 8(a)(3) and (1) of the Act.

Respondent's position with respect to the failure to recall Michael Mahon, Ballantine, McKeown, or Stasen is succinctly summarized in its posttrial brief as follows: ''[Once the decision was made not to recall George Mahon from layoff, none of the individuals named in the charge were recalled because no other foremen chose to take them on his crew.'' The basic premise that the foremen have absolute control over the selection of members of their crews is untenable. Foremen are the lowest level supervisors Respondent has, and the proffer that they have unfettered freedom in accepting and rejecting members of their crews immune from interference by their management superiors is patently unbelievable. Project Manager Russell Egger Jr. stops short of assigning total independence to the foremen in assembling their crews by noting they have heavy influence in that selection by virtue of their better first-hand knowledge of the individual crew members. Egger's statement that foremen have rejected some employees as members of their crews must be read in the light of his other testimony that he has favorably responded to a foreman's request that a particular individual not be assigned to him. The fair implication is that he, not they, exercise the final authority in such assignments. William Bradney, president of Grove, gave the following testimony that supports this conclusion of final authority resting in those superior to the foremen, and the foremen's recommendations being accorded considerable but not conclusive weight:

> Q. To your knowledge, do foremen at your company have input into selecting what crew members will work for them, or who will not work for them?
>
> A. Yes, they do.
>
> Q. Has that been a long-standing practice?
>
> A. Well, we base it on the fact that they are the most knowledgeable for the guys out in the field, so we listen to their input.
>
> But sometimes, we will argue with them, but the foreman generally wins out because they tell us they can control the guys, and well do this, and we will do that, so we sort of let the foreman get their own head at it. We listen to their complaints, but I want them to hear mine, too, about what I don't like about a specific person.

James Kalinoski, a foreman currently employed by Respondent and called as a witness by Respondent, is credited where he testified for Respondent as follows:

> Q. My question was, as a foreman do you have a chance to say or ask the company for certain people to work for you?
>
> A. I can go in and say. They will determine who I get pretty much, so they try and even out, they try and figure out to even out men as best they can to see who is going to work best where, and I could go in and say, ''I want such-and-such a guy, but if he is going to do better somewhere else where they know I can handle a job, they would push him to somewhere else where he is needed, that way the job will go along better, and then I can gripe about it, but if it is going to work that way, then I will save it.
>
> Q. Would there ever be an opportunity where you would tell the company that you didn't want certain individuals?
>
> A. Yes.
>
> Q. You have done that before?
>
> A. Yes.
>
> A. Well, yes. Well, not particularly, but there is guys that I will—they have given me that I don't want with me.
>
> Q. Like who?
>
> A. Well, there are guys that they hired, I don't know exactly their names, it was a while ago, and that I got.

From the foregoing and other relevant testimony, I gather the picture is pretty much as James Kalinoski sets it out. Foreman have input, may be accommodated by their superiors, but do not have the final say in the composition of their crews. The argument that none of the four alleged discriminatees were recalled because no foreman but George Mahon would have them is not convincing because, in addition to the simple fact the basic proposition that foremen may refuse to accept members assigned to their crews is suspect on its face, (1) the evidence shows foremen do not in fact have the final authority to say who will or will not be on their individual crews; (2) the testimony concerning the shortcomings of the four is general, relies on hearsay in some respects, and is unconvincing; (3) there is no evidence any foreman was asked or told to take one or all of them on his crew; (4) other members of Mahon's crew, namely Theodore Kalinoski and Fetscher, were labeled respectively

[13] See, e.g., *Heath International, Inc*., 196 NLRB 318 (1972); *Irwin County Electric Membership Cooperative*, 247 NLRB 1357, 1363 (1980); and *Birch Run Welding & Fabricating v. NLRB*, 761 F.2d 1175, 1179 (6th Cir. 1985), concerning the propriety of finding discriminatory motive through circumstantial evidence.

[14] *Wright Line*, 251 NLRB 1083 (1980); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

by Respondent's witness Coombs as a slow worker (Kalinoski) and as one who stood around and talked a lot (Fetscher) yet both were rehired (Kalinoski after he in effect renounced any union support); and (5) when William Bradney on January 8 told the crew they would be recalled in the spring he listed no exceptions to this promise. Respondent's asserted reasons for rejecting the four employees from employment are excuses rather than reasons, are not convincing excuses, and smack of pretext. Accordingly, I conclude Respondent has not met its *Wright Line* burden of showing the rejection of the four would have occurred in the absence of union activity, and has proffered only pretextual reasons to support its actions. The proffer of false reasons is an indication of unlawful motivation,[15] and adds strength to the General Counsel's case. The General Counsel has proved by a preponderance of the credible evidence that Respondent failed and refused to reinstate or offer to reinstate Marc Stasen, Michael E. Mahon, Thomas McKeown, and William D. Ballantine prior to August 1990 in order to discourage union membership and activity. By so doing, Respondent violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by promising its employees a benefit if they ceased or delayed their union activity.
4. Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate or to offer to reinstate Marc Stasen, Michael E. Mahon, Thomas McKeown, and William D. Ballantine prior to August 1990.
5. Respondent did not violate the Act in any other manner alleged in the complaint.
6. The unfair labor practices found affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

In addition to the usual cease-and-desist notice posting requirements, my recommended Order will require Respondent to make Marc Stasen, Michael E. Mahon, Thomas McKeown, and William D. Ballantine whole for any loss of earnings suffered through August 13, 1990, as a result of the discrimination against them. Backpay shall be calculated and interest thereon computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[16] I shall further recommend that Respondent be required to remove from its files any references to the failure and refusal to reinstate Marc Stasen, MichaeL E. Mahon, Thomas McKeown, and William D. Ballantine, and notify them in writing that this has been done and that the failure and refusal to reinstate them will not be used against them in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Grove Roofing, Inc., and DiPietro Construction, Inc., Ivyland, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promising employees benefits if they cease or delay union activity.

(b) Failing and refusing to reinstate or otherwise discriminating against employees in order to discourage union membership and activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Marc Stasen, Michael Mahon, Thomas McKeown, and William D. Ballantine whole for any loss of earnings and other benefits between January 30 and August 13, 1990, as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the failure and refusal to reinstate Marc Stasen, Michael Mahon, Thomas McKeown, and William D. Ballantine, and notify them in writing that this has been done and that the failure and refusal to reinstate them will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business and current construction projects copies of the attached notice marked ''Appendix.''[18] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[15] *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); and see, also, *Elion Concrete*, 299 NLRB 1 (1990).

[16] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''